

U.S. Department of Labor Announces Updates to the H-2B Temporary Labor Certification Program

February 26, 2019

H-2B Processing Announcement

The Department of Labor's (Department's or DOL's) Office of Foreign Labor Certification (OFLC) is making this announcement to inform employers and other interested stakeholders of how H-2B *Applications for Temporary Employment Certification*, Form ETA-9142B, filed by employers on or after July 3, 2019, will be assigned to staff for review in accordance with 20 CFR 655.30. The Department believes these procedural changes will provide for fairer and more orderly assignment and review of applications.

Statutory Background

The Immigration and Nationality Act (INA), 8 U.S.C. 1101, *et seq.*, establishes the H-2B nonimmigrant classification for a nonagricultural temporary worker "having a residence in a foreign country which he has no intention of abandoning who is coming temporarily to the United States to perform . . . temporary [non-agricultural] service or labor if unemployed persons capable of performing such service or labor cannot be found in this country." 8 U.S.C. 1101(a)(15)(H)(ii)(b). The Secretary of the Department of Homeland Security (DHS), in administering the H-2B program, may grant an employer's petition for an otherwise eligible H-2B nonimmigrant worker "after consultation with appropriate agencies of the Government." 8 U.S.C. 1184(c)(1). The Secretary of DHS also may delegate to "any employee of the United States, with the consent of the head of the applicable Department or other independent establishment, . . . any of the powers, privileges, or duties conferred or imposed" on DHS under the INA. 8 U.S.C. 1103(a)(6); *see also* 8 CFR 2.1. DHS regulations provide that an H-2B

petition for temporary employment in the United States must be accompanied by an approved Temporary Labor Certification (TLC) from DOL. 8 CFR 214.2(h)(6)(iii)(A), (iv)(A). Pursuant to and in accordance with the above authorities, the TLC serves as DHS's consultation with DOL to determine the question of whether a qualified U.S. worker is available to fill the petitioning H-2B employer's job opportunity and whether a foreign worker's employment in the job opportunity will adversely affect the wages or working conditions of similarly-employed U.S. workers. *See* 8 CFR 214.2(h)(6)(iii)(A), (D).

In order to advise DHS on the availability of U.S. workers and the potential for adverse effect on the wages and working conditions of similarly-employed U.S. workers, OFLC provides consultation to DHS through issuance of TLCs, in accordance with 8 U.S.C. 1103(a) and 1184(c). *See* 8 CFR 214.2(h)(6)(iii)(A), (D). DOL and DHS have jointly issued regulations that govern the standards and procedures applicable to OFLC's issuance of TLCs under the H-2B program. *See* 20 CFR 655 subpart A. The regulations at 20 CFR 655 subpart A require employers seeking H-2B temporary labor certification to, among other things, file an *Application for Temporary Employment Certification* and all supporting documentation, hereinafter referred to as the "H-2B application," required by this subpart to secure a TLC from the Department.

The INA sets the annual number of aliens who may be issued H-2B visas or otherwise provided H-2B nonimmigrant status to perform temporary nonagricultural work at 66,000, to be distributed semi-annually, not to exceed 33,000 in the first half of the Federal Government's fiscal year beginning on October 1 of each year and the remainder during the second half of the Federal Government's fiscal year beginning on April 1 of the subsequent calendar year. *See* 8 U.S.C. 1184(g)(1)(B), (g)(10). If insufficient petitions are approved to use all 66,000 H-2B slots

in a given fiscal year, the unused slots are not carried over for petition approvals in the next fiscal year.

Generally, workers in the United States in H-2B status who extend their stay, change employers, or change the terms and conditions of employment will not be subject to the cap. Similarly, an H-2B worker who has previously been counted against the cap in the same fiscal year that the proposed employment begins, will not be subject to the cap if the employer names the worker on the petition and indicates that he/she has already been counted. A spouse and any children of H-2B workers classified as H-4 nonimmigrants are also not counted against this cap. Finally, H-2B petitions for two other categories of workers are exempt from the H-2B cap: fish roe processors, fish roe technicians, and supervisors of fish roe processing, as well as workers performing labor or services in the Commonwealth of the Northern Mariana Islands or Guam from November 28, 2009, until December 31, 2019.

H-2B Temporary Labor Certification Process

The standards and procedures governing the submission and processing of H-2B labor certification applications are set forth in § 655.15 and §§ 655.30-655.35. These regulations generally require, among other things, that a registered employer with a non-emergency situation seeking an H-2B TLC file a completed H-2B application with the National Processing Center (NPC) designated by the OFLC Administrator. *See* 20 CFR 655.15. Except for employers that qualify for emergency procedures at § 655.17, employers that fail to register under the procedures in § 655.11 and/or that fail to submit a Prevailing Wage Determination (PWD) obtained under § 655.10 will not be eligible to file and their H-2B applications will be returned without review.

The Department's regulations require the employer, at the time of filing, to include a signed and dated appendix attesting to compliance with all regulatory assurances and obligations; a valid PWD; a copy of the job order submitted concurrently to the State Workforce Agency serving the area of intended employment; a copy of all contracts and agreements with foreign labor recruiters executed in connection with the job opportunities; and all other applicable documentation supporting the H-2B application. *See* 20 CFR 655.15(a). A completed H-2B application must be filed no more than 90 calendar days and no fewer than 75 calendar days before the employer's date of need (start date for the work). *See* 20 CFR 655.15(b).

The Department's regulations provide that H-2B applications and job orders filed with the NPC are reviewed by the Certifying Officer (CO) for compliance with all applicable program requirements. *See* 20 CFR 655.30(a). Employers have the option of filing H-2B applications electronically or by mail, and, according to procedures announced on June 1, 2018, the NPC sequentially assigns H-2B applications to NPC analysts based on the calendar receipt date and time measured to the millisecond and on Eastern Time, *e.g.*, 12:00:00.000 a.m. Once each H-2B application is assigned, NPC analysts initiate review of each application in the order of receipt date and time, and in accordance with all regulatory requirements.

Based on the NPC analyst's review, the CO authorizes issuance of either a Notice of Acceptance (NOA) under § 655.33 or a Notice of Deficiency (NOD) under § 655.31. Where there are deficiencies in the H-2B application or job order, the NOD provides the employer with 10 business days to correct the deficiencies or file an appeal with the Department's Office of Administrative Law Judges. Where necessary, the CO may authorize the issuance of a second NOD of the employer's H-2B application or job order in order to obtain regulatory compliance. NPC analysts process employer responses to NODs as expeditiously as possible based upon the

date responses are received and, if deemed compliant, the CO authorizes the issuance of a NOA. The NOA authorizes the next step in the process—the recruitment of U.S. workers—and specifies a date on which the employer must provide an initial written report of its recruitment efforts. The Department’s regulations establish minimum recruitment activities that employers must conduct within 14 calendar days from the date the NOA was issued, unless otherwise instructed by OFLC. *See* 20 CFR 655.40-46. Employer-conducted recruitment typically occurs between 40 and 60 calendar days before the date of need and must be completed before the employer submits the recruitment report to the NPC for review meeting the content requirements under § 655.48.

Recruitment reports are reviewed and processed by NPC analysts based on the day they are received, irrespective of the date and time the employer’s H-2B application was originally received. Upon review of the recruitment report, the CO may authorize the issuance of a full or partial TLC or deny the employer’s H-2B application. OFLC grants a TLC only after the employer’s H-2B application has met all the requirements for approving labor certification under § 655.50 and its subpart. In accordance with regulatory requirements, the NPC sends all certified H-2B applications to the employer, or the employer’s authorized attorney or agent, by means normally assuring next-day delivery. To ensure a fair consideration of all employer applications, the NPC does not provide “expedited processing” services on employer requests for a TLC.

Although not required by the INA or regulation, OFLC strives to issue final determinations no later than 30 calendar days before the employer’s start date for the work—a standard that is similar in nature to the H-2A program. Once OFLC grants a TLC, the employer is eligible to file a petition (Form I-129, *Petition for Nonimmigrant Worker*) with the appropriate United States

Citizenship and Immigration Services (USCIS) service center for adjudication. *See* 8 CFR 214.2(h)(2)(i)(A).

History of Changes to H-2B Processing and Reasons for Updating Current Approach

Because of the intense competition for H-2B visas in recent years, the semi-annual visa allotment, and the regulatory requirement that employers apply with OFLC for temporary labor certification 75 to 90 calendar days before the date of need, employers who wish to obtain visas under the semi-annual allotment for periods of need beginning April 1 must promptly apply for a TLC and file a petition with USCIS before the 66,000 annual visa cap is reached. As a result, OFLC typically experiences significant “spikes” in H-2B applications for temporary or seasonal jobs that are expected to start during the United States’ spring and summer months.

Prior to 2018, OFLC processed applications irrespective of the time of day the application was filed and processed applications based on the day they were filed. On January 1, 2018, OFLC received approximately 4,498 applications covering 81,008 worker positions for April 1 start dates of work, exceeding the semi-annual visa allotment by nearly 250 percent. This was the first time in recent years that applications received within the first day of the filing period exceeded the semi-annual visa allocation. In order to promote fairness in response to the unprecedented volume of applications, OFLC determined it was necessary to adjust its application processing procedures to better reflect the sequential order in which applications were filed. Thus, on January 17, 2018, OFLC announced that it would begin to release certified applications on February 20, 2018, in sequential order based on the day and time the applications were filed (January 17 procedures).

As participation in the H-2B program has grown significantly over the years, OFLC anticipated that it would continue to receive a significant surge of applications within a short timeframe during its next application cycle. In order to provide an equitable solution to this problem, on June 1, 2018, OFLC announced that it would sequentially assign H-2B applications to analysts based on the calendar date and time on which the applications were received, based on Eastern Time, and measured to the millisecond (*e.g.*, 12:00:00.000 a.m.) (June 1 procedures). Based on the June 1 procedures, once these applications were assigned to the analysts, the analysts would initiate review of applications in the order of receipt date and time, issue first actions on a rolling basis, and issue certifications as all regulatory requirements were met.

OFLC implemented the June 1 procedures after considering all available data as well as OFLC's experience in processing H-2B applications to date. However, as a result of stakeholder comments and the most recent filing period, OFLC has determined it is necessary to reassess those procedures. The June 1 procedures were in effect in January 2019, when OFLC received approximately 5,276 applications covering more than 96,400 worker positions for start dates of work on April 1, exceeding the semi-annual visa allotment by nearly 300 percent. Within the first five minutes of opening the semi-annual H-2B certification process on January 1, 2019, the Department's network infrastructure supporting OFLC's electronic filing system experienced more than 22,900 server login attempts, in contrast with only 721 attempts in approximately the same time period for the 2018 filing season. This unprecedented volume of simultaneous system users—30 times the number of users in the previous year—ultimately caused the electronic filing system to become unresponsive and prevented almost all employers from filing H-2B applications. Although the Department was able to restore OFLC's electronic filing system by

January 7, 2019, some employers continued to report technical difficulties with accessing the electronic filing system.

OFLC previously concluded that the assignment of applications to NPC analysts based on date and time of receipt was the most equitable method of addressing the significant volume of H-2B applications received. However, it did not anticipate the burdens this approach would create on its electronic filing system, network infrastructure, and staff resources on January 1, 2019. Given the growing demand for H-2B visas, and related demand for TLCs, OFLC expects that the demands on OFLC's information technology infrastructure will continue to increase. In addition, OFLC has determined that the current approach does not account for technological issues that an individual user may experience on his/her end that could impact his/her ability to participate in the program. In addition, because the first filing date for each semi-annual cap period occurs on or near a Federal holiday when many businesses may be closed, OFLC is amending its procedures to provide increased flexibility to allow those employers an opportunity to participate in the program. For these reasons, OFLC has concluded that changes to the procedures under which H-2B applications are assigned to NPC analysts are necessary to promote a more orderly and fair process for all employers seeking access to the H-2B visa program. OFLC believes that the process described below balances employers' interest in utilizing the H-2B program with OFLC's interest in ensuring that access to its filing system is equitable and occurs with no user disruption.

Random Selection Process for Assigning H-2B Applications

For employers seeking a TLC to employ H-2B workers beginning on or after October 1, 2019, OFLC plans to randomly establish the order in which all H-2B applications will be

assigned to NPC analysts for review and processing in accordance with § 655.30. Based on its experience and feedback from stakeholders, the Department has determined that this process will be most effective in promoting a fair and orderly assignment of applications for OFLC review.

This assignment process will be dependent on when employers submit their applications and the start dates they request. OFLC will first process applications from employers seeking TLCs to employ H-2B workers beginning on the earliest start date of work permitted under the semi-annual allotments set forth at sections 214(g)(1)(B) and 214(g)(10) of the INA where those employers submitted applications during the initial three calendar days of the time period for filing for the relevant semi-annual visa allotment.

Once those applications have all received a NOA or NOD, OFLC will then begin to process applications from all other employers, including: (1) employers seeking TLCs to employ H-2B workers beginning on dates later than the earliest start date of work permitted under the semi-annual allotments during the initial three-day filing window, and (2) employers seeking TLCs to employ H-2B workers beginning on the earliest start date of work permitted under the semi-annual visa allotments if their applications are filed outside of the initial three-day filing window.

Random Selection Process for Assigning H-2B Applications Received During the Initial Three Days of the Filing Period for the Earliest Start Date of Work

OFLC will randomly order for processing all of the completed H-2B applications requesting the earliest permissible start date of work and filed during the initial three calendar days of the time period for filing for the relevant semi-annual visa allotment. The rationale for using a three-day filing window is explained below. As an example, for employers seeking a TLC to employ H-2B nonimmigrant workers on April 1, 2020—which is the earliest start date of work permitted

under the second semi-annual allotment of H-2B visas for Fiscal Year (FY) 2020—OFLC will randomly order for processing all of the completed H-2B applications that are received on January 2 through January 4 (the first three calendar days to file H-2B applications under § 655.15(b) in the second half of FY 2020 because 2020 is a leap year containing an additional day in February).

More specifically, on the next business day following this three-day filing window, using a standard computer-generated process for randomizing values in a data set, OFLC will generate and assign a unique random number to each completed H-2B application filed within the three-day filing window with the earliest start date of work. The applications will be sorted in ascending order based on the unique random number assigned to each application. Based on that randomly-generated order, OFLC will select the number of H-2B applications that, combined, contain a sufficient number of worker positions to reach the semiannual visa allotment under the INA (*i.e.*, 33,000). These applications will be placed in an H-2B “Assignment Group” (*i.e.*, Group A) and assigned to NPC analysts for processing in a manner consistent with §§ 655.30-33. The initial H-2B Assignment Group (*i.e.*, Group A) will always include the number of H-2B applications containing a sufficient amount of worker positions to reach the applicable numerical visa cap, even if the numerical limits of the INA are subsequently changed.

OFLC will then assign to additional Assignment Groups, in ascending sequential order, all remaining H-2B applications that were filed during the initial three-day filing window that requested the earliest start date of work permitted. Each H-2B Assignment Group after Group A (*e.g.*, Group B, Group C, *etc.*) will total no more than 20,000 worker positions, or roughly 1,000 applications per group.

OFLC will assign to NPC analysts all of the H-2B applications placed in Group A for issuance of NODs or NOAs. Once all applications in Group A are issued a NOD or NOA, OFLC will assign to NPC analysts all H-2B applications placed in Group B for issuance of NODs or NOAs. This process will be repeated until each group of H-2B applications is assigned to NPC analysts for processing and NODs or NOAs are issued.

That the number of applications in the initial Assignment Group (*i.e.*, Group A) is tied to the numerical cap is not meant to be determinative of which employers will ultimately receive H-2B visas, nor does it preclude employers whose applications are in subsequent groups from ultimately receiving H-2B visas. OFLC has simply determined that the statutory cap is a reasonable benchmark for this initial assignment and believes this—in addition to the notice provided, as explained below—will provide the public and interested stakeholders a more transparent view of the process.

If the H-2B applications received during the initial three-day period collectively request certification for fewer worker positions than the statutory numerical limitation, all H-2B applications filed within that time period and requesting workers for the earliest possible start date of work will randomly be given a unique number and placed into the same group for assignment to and processing by NPC analysts.

OFLC has chosen to utilize a three-day filing window at the outset of each application cycle for several reasons. First, the three-day filing window will alleviate the strain placed on OFLC's electronic filing system and network infrastructure that results from a surge of applications submitted at the same time. Second, the window will provide employers that file on the earliest possible date, which in most instances falls on a Federal holiday or the day before a Federal holiday, with a reasonable period of time to submit their H-2B applications or resolve any

technological issues they might face during filing. Third, under the previous procedures, mailed applications were put at a distinct disadvantage. A three-day filing window allows applications filed by mail to be included in the random selection process, thus placing them on equal footing with employers who file electronically. Fourth, and as explained below, because applicants will be able to see which processing group they have been placed in, and the general number of applications in that processing group, these procedural changes may reduce some associated costs for employers who spend time and resources related to preparing applications, responding to NODs, and conducting advertising and recruitment for qualified U.S. workers without knowing whether their H-2B petitions will be accepted by USCIS due to the statutory semi-annual visa allotments.

Random Selection Process for Assigning all other H-2B Applications

As noted above, for all other employers seeking a TLC to employ H-2B workers—including employers who are seeking a TLC to employ H-2B workers beginning on a date that is later than the earliest start date of work permitted under the semi-annual allotments and employers seeking a TLC to employ H-2B workers beginning on the earliest start date of work permitted if their application is filed outside of the initial three-day filing window—OFLC will randomly assign for processing all of the completed H-2B applications filed on a single calendar day *after* it finishes processing NOAs and NODs for applications filed during the initial three-day filing window (as discussed above). As an example, for employers seeking a TLC to employ H-2B nonimmigrant workers on April 2, 2020—which is the next start date of work permitted under the second semi-annual allotment of H-2B visas for FY 2020—OFLC will randomly assign to NPC analysts for processing all of the completed H-2B applications that are filed on January 3

with an April 2, 2020 start date of work, after OFLC finishes processing NOAs and NODs for the applications filed during the initial three-day filing window for the earliest start day of work.

Application Processing after Random Selection and Assignment Occur

Once the random assignment process is completed, NPC analysts will review each H-2B application in accordance with § 655.30 and current standard operating procedures. Following issuance of NOAs and/or NODs in accordance with procedures outlined above, H-2B applications will be processed as each successive stage in the process is completed. Employers receiving NOAs may proceed to meet the additional regulatory requirements, including recruitment of U.S. workers and submission of recruitment reports. Employers receiving NODs must correct any deficiencies and receive NOAs before proceeding to meet the additional regulatory requirements.

Recruitment reports will be reviewed and processed based on the day they are received, and the CO will authorize the release of certified H-2B applications in accordance with standard operating procedures and where all the requirements for granting a TLC under the subpart are met as of that day. The CO will continue to process and authorize the issuance of final determinations on all H-2B applications that are received, irrespective of whether the employer is seeking to employ H-2B nonimmigrant workers in cap-exempt positions. Additionally, the CO will process and authorize the issuance of rejections, request for withdrawals, and denials of labor certification applications in accordance with standard operating procedures.

Public Notifications

OFLC intends to issue several public announcements as applications are received and processed under the procedures described above. Once the random assignment process is completed, as described above, OFLC will provide written notification to employers and, if applicable, employers' authorized representatives of their H-2B Assignment Group. Within five business days after the random assignment process is completed, OFLC will place on its website a listing of the H-2B applications assigned to each H-2B Assignment Group. Second, OFLC will provide the public with updates on its website related to the number and percentage of H-2B applications issued a first action within each H-2B Assignment Group. Finally, OFLC will provide regular updates on its website related to the number of H-2B applications certified with the same date of filing, including the number of worker positions, so the public is aware of the general timeframes in which the semi-annual visa allotment may be reached.

Because of the public's wide use of OFLC's website, the posting of information on the OFLC website provides a timelier and more efficient method of disseminating such information to the public than publication of the information in the *Federal Register*. The public frequently turns to OFLC's website for general information on labor certification requirements, regulations and forms, specific case status information, and processing times for H-2B applications. Therefore, all notifications regularly updating the public on implementing these procedures will be made available on or through the OFLC website at www.foreignlaborcert.doleta.gov.

Request for Comments and Effective Date

These new procedures will take effect on July 3, 2019. OFLC seeks comments on the above procedures. Comments may be sent to H2BReform.Comments@dol.gov or mailed to Thomas M. Dowd, Deputy Assistant Secretary, Employment and Training Administration, U.S. Department of Labor, Box PPII 12-200, 200 Constitution Avenue, NW, Washington, DC 20210 until 30 days after issuance of this notice in the Federal Register. OFLC will review all of the comments received and will make any changes it determines are appropriate prior to July 3, 2019.